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December 18, 2018

Metropolitan Transportation Commission
Joseph P. Bort MetroCenter
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Attention: Executive Director Steve Heminger
Email: SHeminger@mtc.ca.gov
Attention: General Counsel Adrienne D. Weil
Email: AWeil@mtc.ca.gov
Attention: Designated Representative Kevin Mulder
Email: KMulder@mtc.ca.gov

Re: MTC's BAY AREA BIKE SHARE AGREEMENT WITH MOTIVATE

Dear Executive Director Heminger:

Social Bicycles, LLC d/b/a JUMP ("JUMP") has asked our office to provide input regarding the agreement between Bay Area Motivate ("Motivate") and the Metropolitan Transportation Commission ("MTC"). I write to explain our analysis that Motivate does not have contractual exclusivity over e-bike or dockless bike sharing programs.

Motivate's contractual arrangement with MTC does not present a legal barrier to allowing dockless e-bikes because: (1) the Coordination agreement between MTC and Motivate did not adhere to proper procedures for a sole source contract; (2) the agreement only provides exclusivity over docked (not dockless) bikesharing, and the specific exclusivity provision for (docked) e-bikes expired after June 30, 2016; (3) the agreement applies only to procurements, not regulatory permits, and should not be read in a manner that would relinquish city and county authority to regulate bikesharing; and (4) several of the city ordinances implementing or authorizing the agreement either limited exclusivity to operation of a point-to-point docked bikesharing program (San Francisco), or did not authorize exclusivity at all (Oakland, Berkeley).

I. MTC'S AGREEMENT WITH MOTIVATE DID NOT FOLLOW PROPER PROCEDURES FOR A SOLE SOURCE CONTRACT

The Program Agreement signed between MTC and Motivate does not provide Motivate with any exclusive rights that would prevent Bay Area cities from implementing other forms of bikesharing. Nor could MTC provide Motivate with the right to exclusively operate bike share in the Bay Area, as the MTC is not empowered to either enter into such restrictive contracts or restrict the contracting ability of Bay Area cities, per Government Code Section 66500 *et seq.* As

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demonstrated by the efforts of the individual cities described below to expressly limit Motivate's exclusivity, the Coordination Agreement was not intended to give Motivate control over all bikesharing in the Bay Area.

The Bay Area Bike Share Program began as a competitive procurement process led by the BAAQMD. The original program included San Francisco, Redwood City, Palo Alto, Mountain View, and San Jose. When Motivate acquired Alta and unilaterally proposed a new format and agreement for the Bay Area Bikeshare Program, MTC should have made an effort to re-open a competitive proposal process, or at least ensured that the agreements with Motivate did not purport to grant Motivate any exclusive rights. While the Program Agreement purports to "continue" the original Alta program, there are a series of issues with MTC's decision to proceed without opening the program up to other operators, and in particular, in endorsing any sort of expansive interpretation of the exclusivity provisions included in the Coordination Agreement. Specifically, the Program Agreement with Motivate included cities that were not part of the original pilot program (Berkeley, Emeryville, and Oakland) and excluded cities that did participate in the pilot (Redwood City, Palo Alto, and Mountain View). In addition, the Coordination Agreement is not simply a no-cost permit agreement, as it provides participating cities with a procurement option to purchase additional stations, docks, and bicycles, in Section 3.3 and Appendix A. This raises serious question as to whether the agreement with Motivate was actually a "continuation" of the old program or essentially a new agreement. A new agreement would require more vetting and an enhanced competitive selection process rather than a unilateral contract with Motivate with unclear implications for future transportation alternatives. MTC's sole source justification provided a list of benefits of the program, but failed to justify avoiding competition, and failed to fully consider the detrimental effects of either the limited exclusivity granted to Motivate or Motivate's potential use of those limited provisions to attempt to prevent other bikesharing alternatives in the Bay Area.

With serious questions about the nature of the new agreement, MTC should not allow Motivate to use the terms of the agreements to prevent competition, and should clarify that Bay Area cities are not restricted from pursuing other bikesharing alternatives.

II. SCOPE OF EXCLUSIVITY GRANTED IN COORDINATION AGREEMENT

The Coordination Agreement provides Motivate with exclusive rights to operate dock-based bike share in certain limited geographic areas, but should not be read to preclude alternative forms of bike share, including JUMP's dockless e-bikes. Specifically, (1) the agreement only provides for exclusivity as to docked bikeshare, not dockless bikesharing systems; and (2) the agreement only provides a limited period of exclusivity for e-bike sharing, and that exclusivity has expired.

The Coordination Agreement separately addresses Motivate's rights as to (1) its normal docked non-electric bikes and (2) other forms of bike share, including e-bikes.

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- **Exclusivity for Non-E-Bike Bike Share:** Section 32.1 grants Motivate “the exclusive right to operate a bike share program in the public rights-of-way in the participating Cities during the Term, with the exception of (i) non-automated non-self-service (i.e., renting a bike requires direct in-person human interaction) bike rental operations, (ii) electric scooter sharing program, and (iii) automated (i.e., renting a bike requires no direct in-person human interaction) roundtrip bike share operations (i.e., where the renter is required to return the bike to the same location from which it was rented).”
- **Exclusivity for E-Bike Bike Share:** Section 32.3 grants Motivate “the exclusive right to operate a bike share program with e-assist or electric bikes ('EBikes') in the public rights-of-way in the Participating Cities until June 30, 2016.”
 - After June 30, 2016, Motivate is only granted a period of exclusive negotiating rights if one of the participating cities decides to carry out a procurement (RFP or otherwise) for e-bike share.

First, these provisions only relate to Motivate's docked bikeshare program, not dockless bikesharing programs. The Coordination Agreement recognizes that Motivate is seeking to “expand” the dock-based pilot program operated by Alta, and describes Motivate's entire bikesharing platform with reference to the “stations” or “docks” that form the basis of the service. The agreement recognizes that Motivate's services are dependent on these docks, and the majority of the agreement deals with how to site, maintain, and potentially move or deactivate these stations. As San Francisco recognized, as described below, any exclusivity granted to Motivate was simply in the name of operating a single dock-based system, not in granting Motivate monopoly rights it could use to prevent any bikeshare competitor from operating in the Bay Area.

Second, while the Coordination Agreement purports to grant a period of exclusivity over e-bikes used in bikeshare, that exclusivity expired on June 30, 2016. Motivate's only surviving purported rights would apply if a city began a formal procurement for e-bike share services. As to our knowledge no participating city has a formal procurement process for an e-bike share service pending, Motivate does not currently have any effective right to interfere or prohibit participating cities from entering into permits, franchises, or other alternative arrangements with e-bike share providers such as JUMP.

III. THE CITIES' AUTHORITY TO REGULATE DOCKLESS BIKE SHARING REMAINS UNINHIBITED

MTC's contract should not be read in a manner that would relinquish the cities' authority to regulate bikesharing through a permitting, franchising, or other general regulatory or “police power” structure. Earlier this year, the City of San Diego's City Attorney issued guidance that San Diego's contract with Deco Bikes could not limit the City's authority to authorize other

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bikeshare operations in the City.¹ As the San Diego City Attorney explained in its memorandum: “The Deco Bike Agreement does not insulate Deco Bike from competition.”² Cities maintain their fundamental power to regulate activities such as bikesharing, and can regulate or permit companies such as JUMP to operate alongside Motivate.

As a lead agency involved in the agreements with Motivate, MTC must ensure that Motivate does not overstep the rights written into those agreements. MTC should make it clear to the participating cities that Motivate cannot prohibit them from regulating and enabling dockless e-bikes.

IV. SCOPE OF EXCLUSIVITY GRANTED BY THE CITIES

The cities that signed the Coordination Agreement had to authorize that agreement, and most did so with some sort of legislation laying out the conditions for the agreement between the city and Motivate. The Coordination Agreement specifically provides that the grant of exclusivity is subject to the adoption of a franchise ordinance by the City of Oakland and the City of Berkeley.³ Separately, Sections 14.4 and 16.7 make clear that the agreement is entered into under California law, and that the agreement is subject to all local laws and regulations. The authorizing legislation and those franchise agreements described below limit any language in the Coordination Agreement to the contrary. And regardless the language in the agreement, no City signatory could grant exclusivity beyond the scope of its authority. As described below, San Francisco, Oakland, and Berkeley each explicitly limited the scope of Motivate’s purported exclusivity in significant ways.

A. San Francisco

The City of San Francisco authorized the agreement to grant Motivate a limited exclusive right to provide a dock-based bike-sharing system via Board of Supervisors Resolution 503-15 on December 8, 2015. The City granted Motivate the “exclusive right to operate **automated, self-service, point-to-point non-e-assist bike sharing in the public right-of-way, and an exclusive right to operate a bike share program with e-assist or electric bikes in the public right-of-way until June 30, 2016.**” San Francisco limited Motivate’s rights in important ways, leaving open the option to employ other bike share alternatives to fill the gaps in Motivate’s program.

San Francisco Transportation Code Section 909 governs permits for dockless bike share and does not contain any limitations on the city’s ability to grant those permits. However, when

¹ See Memorandum from Office of City Attorney to Councilmember David Alvarez re: Exclusivity of City’s Agreement with Deco Bike, LLC (Jan. 24, 2018), available at <http://does.sandiego.gov/memooflaw/MS-2018-1.pdf> (“As a municipality, the City cannot contract away its police power. 45 Cal. Jur. 3d Municipalities § 243 (2017).”).

² *Id.*

³ Coordination Agreement at Section 32.4.

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San Francisco began this process, Motivate asserted that the city was violating the Coordination Agreement and forced San Francisco into the dispute resolution process under the agreements with MTC. The process between MTC, SFMTA, and Motivate resulted in a November 27, 2017 “Settlement,” which purportedly granted “permission” for San Francisco to enter into a dockless e-bike bike share pilot permit, eventually granted to JUMP.

While the Settlement Agreement does not appear to grant Motivate any new rights, and does not purport to modify or amend the Coordination Agreement per Section 14.2,⁴ the descriptive language in the Settlement Agreement goes far beyond the rights granted to Motivate in the Coordination Agreement. Motivate apparently pushed to include language generally describing its “exclusive right to operate a bike share program in the public rights-of-way...” and “agree[ing] to a one-time exception to its exclusivity in the area of e-bikes.” This language demonstrates the expansive interpretation Motivate is attempting to force on Bay Area cities, despite the restricted language in the Coordination Agreement and San Francisco’s authorizing legislation. As a key participant in the agreements with Motivate and the Dispute Resolution Process, MTC must make clear both to Motivate and the participating cities that Motivate cannot expand its rights after-the-fact, and cannot prohibit cities from allowing other bike share companies to operate.

B. Oakland

Oakland conditioned approval of the Coordination Agreement and Motivate’s bike share system on the city’s approval of a franchise agreement with Motivate. Oakland’s City Council then passed an ordinance granting Motivate a non-exclusive franchise for point-to-point bike share as described in the Coordination Agreement, and authorized the City Administrator to enter into a non-exclusive franchise agreement with Motivate. Oakland City Council Ordinance 13355 contains careful limitations on Motivate’s rights:

- Recital No. 9: “[I]t is the intent of the City to grant a franchise to Motivate, contingent on the City's successful negotiation and execution of a Bike Sharing Program Franchise Agreement with Motivate, to operate a **Bike Share Program with Bicycle Share Stations where members of the public can dock and undock public bicycles, electric assist bicycles, tricycles, and electric mopeds using a key fob, credit card, mobile phone application, or other technology suited to the purpose, with payment kiosks and wayfinding elements**, and advertise a program sponsor on the equipment, as more fully described in the Program Agreement and the Coordination Agreement.”

⁴ See, *P&D Consultants, Inc. v. City of Carlsbad*, 190 Cal. App. 4th 1332, 1341 (2010) (public contracts can only be amended pursuant to the terms and procedures stated within the contract).

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- Section 1: “The City will grant Motivate the right to operate a bike share program **only for an automated, point-to-point program as described in the Coordination Agreement** and is contingent on the City's successful negotiation and execution of a Bike Sharing Program Franchise Agreement with Motivate, for the operation of the Bike Sharing Program.”
- Section 6: “The City Administrator is authorized to negotiate and execute **a non-exclusive Franchise Agreement with Motivate**, subject to the review and approval of the City Attorney.”

Despite this careful construction, Motivate apparently pushed for contradictory language in the resulting Franchise Agreement. Section 1 of the Franchise Agreement acknowledges that the Franchise Agreement is subject to Ordinance 13355, but also somehow describes the ordinance as granting Motivate an exclusive franchise, despite the language of the statute itself. The expansive language in the Franchise Agreement appears unenforceable, as Oakland’s City Charter reserves the power to set conditions and grant franchises to the City Council. As the City Administrator cannot exceed the conditions set by the City Council, at least that language in the Franchise appears invalid.⁵ MTC should ensure that cities and the relevant transportation agencies working with MTC clearly understand the limits contained within the authorizing legislation that provide for a more flexible approach to bikesharing.

C. Berkeley

The City of Berkeley’s relationship with Motivate is also governed by a non-exclusive franchise agreement. Article XII of the Berkeley City Charter requires a franchise agreement when a private entity seeks to provide transportation services or “use the public streets[.]” Pursuant to this requirement, Section 32.4 of the Coordination Agreement required Motivate to enter into a franchise agreement with Berkeley to make the Coordination Agreement effective. Pursuant to this requirement, the Council of the City of Berkeley passed Ordinance No. 7,454-N.S., authorizing the City Manager to enter into a franchise agreement with Motivate.

While the Ordinance does not include terms for the agreement within the statutory text, Section 2 includes those terms by reference to the draft franchise agreement attached to the Ordinance. Section 1 of the draft franchise agreement states that Berkeley is granting “**a non-exclusive** Franchise authorizing Grantee to implement a bike share transportation program” and further, that “Grantee acknowledges that this Franchise is **not exclusive** and that the Franchise is subject to the terms and conditions specified in the City Charter, the terms and conditions

⁵ See, *First St. Plaza Partners v. City of L.A.*, 65 Cal. App. 4th 650, 661, 671 (1998) (city contracts must comply with the city charter); *G. L. Mezzetta v. City of Am. Canyon*, 78 Cal. App. 4th 1087, 1094 (2000) (contracts that failed to meet city requirements for approval were void); *Katsura v. City of San Buenaventura*, 155 Cal. App. 4th 104, 109 (2007).

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specified in [the Ordinance], the provisions of Chapter 9.60 of the Berkeley Municipal Code, and the terms and conditions of this Bike Share Franchise agreement (“Agreement”). Chapter 9.60 of the Berkeley Municipal Code sets the conditions for public utility franchises, and reaffirms the City Council’s power to set binding terms and conditions for the franchise in Sections 9.60.070 and 9.60.100. Like Oakland and San Francisco, Berkeley clearly limited any stated exclusivity in the Coordination Agreement and left open the opportunity to work with other bikesharing companies.

V. CONCLUSION

MTC’s agreements with Motivate and the participating cities allow JUMP to work alongside docked bikeshare to provide dockless e-bike services in the Bay Area. As the lead agency involved with the Bay Area Bike Share Program, it is MTC’s responsibility to ensure that the parties to those agreements interpret and enforce them fairly. As the leading agency coordinating Bay Area transportation, it is MTC’s mission to ensure that effective transportation alternatives are available to Bay Area residents. MTC should ensure that Motivate does not use its limited right to operate dock-based bike share to prevent cities from enabling dockless e-bike share. MTC should work with the cities that are participating in the Bay Area Bike Share Program to ensure that they do not artificially restrict the transportation alternatives available to their citizens. We are available to discuss these issues further to ensure that MTC’s agreements are implemented fairly and accurately and to ensure that these agreements do not artificially restrict JUMP’s ability to provide dockless e-bike services in the Bay Area.

Sincerely yours,



Mark Linderman

/drl

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